STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2014
v	No. 312656 Oakland Circuit Court
CHEYENNE BENJAMIN INGRAM, Defendant-Appellant.	LC No. 2012-240325-FC

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of six counts of assault with intent to commit murder, MCL 750.83, and one count of conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316. The trial court initially sentenced defendant to concurrent prison terms of 285 to 840 months (23-3/4 to 70 years) for each conviction, but then subsequently resentenced defendant to a term of life imprisonment without parole for the conspiracy conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm defendant's convictions but remand for correction of the judgment of sentence issued on resentencing.[1]

I. BACKGROUND

Defendant's convictions arise from a shooting at a private skating party at the Rolladium skating rink in Waterford Township during the early morning hours of December 23, 2011. According to advertising fliers, the party was sponsored by "GME & LBM.[2]" The party

[1] Although defendant does not raise this issue, we note that the judgment of sentence issued on resentencing erroneously states that defendant's life sentence for the conspiracy conviction is for "NAT LIFE W/O PAROLE." Conspiracy to commit first-degree murder is a parolable life offense. MCL 791.234(6); *People v Jahner*, 433 Mich 490; 446 NW2d 151 (1989). Therefore, we remand for correction of the judgment of sentence to delete the erroneous language.

[2] Oakland County Sheriff's Deputy Greg Moore testified that "LBM" stood for "Leak Boy Mafia," which is allegedly a family organization associated with Pontiac and other "street organizations" that his unit has investigated since his assignment to the FBI violent gang task force in 2008.

began on the evening of December 22, 2011, and continued into the early morning hours of December 23. During the event, a number of fights broke out.

According to Quintin Hardiman, a security officer at the Rolladium, defendant, Treandis Jamison,[3] and Robert German were ejected from the building after an initial large fight. Hardiman had hoped that the ejection would end the fighting. After defendant was ejected, Hardiman observed him standing outside the building holding a small-barreled revolver. Defendant was breathing hard and Hardiman heard him say, "They jumped on me." Hardiman left his station at the entranceway to break up more fighting inside. The entrance doors were locked to prevent entry from the outside, but a person could still gain entry if someone from the inside opened the door. Shortly after Hardiman left his position at the entranceway, gunshots were fired inside the building. The prosecutor argued at trial that defendant, Treandis Jamison, and Robert German all entered the building and fired guns indiscriminately into a large crowd of party attendees. The defense theory at trial was that defendant was not involved in the shooting.

Surveillance cameras captured some of the activities inside and outside the building, including images of defendant with Jamison and German in the parking lot and their movements after they reentered the building and proceeded to the archway entrance of the skating rink where the gunshots were fired. Six persons received gunshot injuries.

II. IDENTIFICATION EVIDENCE

We first address defendant's argument that the trial court erred in denying his pretrial motion to suppress Hardiman's identification of his image in photographs obtained from the Rolladium's surveillance cameras. The identification occurred during a police interview approximately four days after the shooting. The trial court denied defendant's motion to suppress following a *Wade*[4] hearing. We review a trial court's factual findings at a suppression hearing for clear error and review its application of constitutional standards to the factual findings de novo. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993); see also *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013).

"Most eyewitness identifications involve some element of suggestion." *Perry v New Hampshire*, 565 US ___; 132 S Ct 716, 727; 181 L Ed 2d 694 (2012). But "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process

[3] Defendant was tried jointly with codefendant Jamison, before a separate jury. Jamison was convicted of six counts of assault with intent to commit murder, conspiracy to commit first-degree murder, carrying a concealed weapon, MCL 750.227, and six counts of possession of a firearm during a commission of a felony, MCL 750.227b. Codefendant Jamison's appeal is pending in Docket No. 312460, which has been submitted with this appeal for this Court's consideration.

[4] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Id.*, 132 S Ct at 728. Therefore, the "Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Id.* at 729.

Where a judicial inquiry is appropriate, the defendant bears the burden of showing in light of the totality of the circumstances that the procedure used was so impermissibly suggestive that it led to a substantially likelihood of misidentification. *Kurylczyk*, 443 Mich at 302; *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). If the trial court finds that a procedure was unduly suggestive, the pretrial identification is inadmissible at trial, but in-court identification testimony may still be allowed if there is an independent basis for the testimony. *Kurylczyk*, 443 Mich at 303; *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). "The independent basis inquiry is a factual one," and the prosecution has the burden of showing by clear and convincing evidence that the in-court identification has an independent basis. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

Following the *Wade* hearing conducted in this matter, the trial court concluded that the identification procedure used during the police interview was not impermissibly suggestive, reasoning:

> At the time of the interview, none of the suspects were in custody. The interview video shows that the officers are simply asking Mr. Hardiman about his memory of the night of the shooting.
>
> Before being shown any pictures, Mr. Hardiman very specifically identified the three youths that he threw out of the rink that night. Regarding the suspect he encountered at the front door holding the revolver, the [sic] Mr. Hardiman described him as younger, wearing a black shirt, dressier black pants, with a black jacket, and an afro. After the police listened to Mr. Hardiman's description of Defendant and the two other youths, they showed him some pictures. Mr. Hardiman immediately identified Defendant (who matched the description that Mr. Hardiman previously provided) as one of the youths that the witness threw out that later returned with the revolver. There is no evidence on the record that this identification procedure was highly suggestive or gives rise to a substantial likelihood of misidentification. The Court does not find the interaction suggestive at all.

Defendant argues that the *Wade* hearing established a substantial likelihood that Hardiman misidentified defendant at the photographic lineup because Hardiman was not given a series of photographs to view and was directed to defendant's photograph. In addition, defendant argues, Hardiman admitted to the police that he saw defendant's photograph in the newspaper. Defendant also contends that the police coached Hardiman into asserting that defendant was the shooter, impermissibly corrected Hardiman when he identified a photograph

of someone else as a shooter[5], and impermissibly told Hardiman that defendant came from a family with criminal problems. Thus defendant argues, based on the totality of the circumstances, the trial court should have held that the police interview of Hardiman was completely unreliable, that the police engaged in impermissibly suggestive conduct, and that the admission of any identification evidence arising from the police interview would violate defendant's due process rights. Defendant then requests this case be remanded for proceedings to determine whether an independent basis exists for any in-court identifications.

We begin our analysis of defendant's arguments on this issue by noting that the evidence presented in this case makes clear that Hardiman was not an eyewitness who viewed every aspect of the defendant's movements before, during, or after the commission of these crimes. Hardiman testified that the event " . . . was, kind of, confusing . . . because as people were shooting, I was actually on the floor, looking up, trying not to get shot, myself, but I did see Mr. Ingram with a gun before the shooting started." Defendant is correct in his assertion that the surveillance photographs shown to Hardiman went beyond everything that Hardiman personally viewed on the night of the shooting. Indeed, Hardiman used photographs of defendant inside the building to identify him as the person he saw outside with the gun. As stated by the trial court, police did not ask Hardiman to view a photograph lineup, but rather asked him to view surveillance photographs from the Rolladium. The use of surveillance photographs to identify a subject generally is not impermissibly suggestive because the surveillance photographs constitute a memory-refreshing device to show the perpetrator of a crime to an eyewitness, as opposed to depicting a possible suspect. *Kurylczyk*, 443 Mich at 309-310 (GRIFFIN, J.) Surveillance photographs depicting events that an individual is seeing for the first time can, however, also serve to enhance the memory. *Id.*

Reviewing defendant's arguments as a whole, they appear to be directed more at Hardiman's credibility rather than the admissibility of his pretrial identification of the man wearing black clothing in the surveillance photographs. We reach this conclusion by considering, as suggested by defendant, the totality of the circumstances, including the close proximity in time and location of the surveillance photographs to when and where Hardiman interacted with the person he described as wearing black clothing, the accuracy of Hardiman's prior description, Hardiman's certainty in making the identification from the surveillance photographs, and the fact that the police interview took place approximately four days after the shooting. We cannot glean from an examination of these circumstances evidence of suggestiveness which would lead us to conclude that there was a substantial likelihood of misidentification. Rather, our examination of these circumstances leads us to conclude that the

[5] On this issue, Lieutenant Lalone conceded that he corrected Hardiman after he identified the person in black as the person depicted in exhibit 12. Lalone testified that exhibit 12 was a LEIN photograph of Robert German. Waterford Township Detective Gregory Drumb also testified that at the end of the interview with Hardiman he identified exhibit 12 as that of defendant by stating: "That's him."

trial court did not clearly err in finding that the identification procedure was not impermissibly suggestive. Accordingly, the trial court did not err in denying defendant's motion to suppress Hardiman's pretrial identification of defendant as the person depicted wearing black clothing in the surveillance photographs.

Furthermore, the record reflects that the video recording of Hardiman's police interview was introduced as an exhibit at trial only after defense counsel expressed his intent to play that video recording for the jury. The identification evidence previously introduced by the prosecutor was limited to Hardiman's in-court identification of defendant as one of the people ejected from the building and who later tried to reenter the building with a firearm. "The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive." *Barclay*, 208 Mich App at 670. Because the pretrial identification procedure was not unduly suggestive, it is not necessary to determine whether an independent basis existed for Hardiman's in-court identification. Therefore, we deny defendant's request to remand for another evidentiary hearing on this issue.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence was insufficient to establish his guilt of the assault and conspiracy charges beyond a reasonable doubt.[6]

In considering defendant's argument, it is immaterial that the jury acquitted defendant of additional weapons charges because a jury in a criminal case is not required to render consistent verdicts. *People v Russell*, 297 Mich App 707, 722-723; 825 NW2d 623 (2012). When considering a challenge to the sufficiency of the evidence, this Court reviews "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

> The prosecution need not present direct evidence linking a defendant to the crime in order to provide sufficient evidence to support a conviction; "[c]ircumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." [*People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991).] A fact-finder may infer a defendant's intent from all the facts and circumstances. *Id.* "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Furthermore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). [*People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011).]

[6] Although defendant refers to the "great weight of the evidence," he substantively argues that the evidence was legally insufficient to support his convictions.

Defendant was convicted of conspiracy to commit first-degree murder. The essence of a criminal conspiracy is "[a] mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means." *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991). There must be an intent to combine with others and an intent to accomplish the illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). First-degree premeditated murder requires proof of an intentional killing of a person with premeditation and deliberation. *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008); *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Morrin*, 31 Mich App 301, 329; 187 NW2d 434 (1971).

Defendant was also convicted of six counts of assault with intent to commit murder, which requires proof of "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Barclay*, 208 Mich App 670. An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). "The intent to kill may be proven by inference from any facts in evidence." *Barclay*, 208 Mich App at 674. Because of the difficulty in proving a person's state of mind, minimal circumstantial evidence is sufficient to establish an intent to kill. *Unger*, 278 Mich App at 223. It is permissible for a jury to infer an intent to kill from the use of a deadly weapon. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004); *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974).

A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. A conviction under an aiding and abetting theory requires proof of the following three elements:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*Robinson*, 475 Mich at 6 (quotation marks and citations omitted).]

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish each conviction offense. Hardiman's testimony, if believed by the trier of fact, was sufficient to identify defendant as one of the persons ejected from the building after the initial fight. Although there was no photographic evidence showing that defendant was involved in the fight, one of the assault victims, Cargle, testified that he saw defendant "running off at the mouth." According to Waterford Township Police Detective Jack Sutherford, surveillance photographs depicted Cargle fighting with a person believed to be German. In light of Hardiman's testimony that he used a metal detector to search individuals entering the building for weapons before this fight, a jury could reasonably infer that defendant, German, and Jamison did not have a gun at the time of this initial fight.

The surveillance photographs support an inference that defendant was acting in concert with German and Jamison before and after the initial fight began, and that they each acquired a gun at some point while outside the building. Hardiman's testimony indicated that defendant tried to gain reentry while holding a small-barreled revolver, and that Hardiman thereafter left the building entrance to deal with more fighting inside. Although the entrance door was locked from the outside, someone on the inside would have been able to open the door to allow an outside person to enter the building. Surveillance photographs depicted German, followed by Jamison and defendant, back inside the building after Hardiman left his post at the door. The placement of defendant's hands in the photographs suggested that he could have been concealing a gun, like his companions, as they walked toward the entranceway or archway to the skating rink. A firearms examiner testified that evidence recovered following the shooting indicated that between two and four weapons were involved. This evidence, combined with the evidence that defendant was observed possessing a revolver outside the building, supports an inference that defendant was armed with a gun while approaching the entranceway to the skating rink.

We disagree with defendant's argument that the surveillance photograph depicting him running toward the exit after the gunfire started precluded the jury from finding that he actively participated in the offense while out of sight from the surveillance cameras. Even if defendant did not directly participate in the shooting, the evidence that he was armed with a firearm and acted in concert with German and Jamison would have allowed the jury to find that he aided and abetted his companions by adding security and support. Similarly, defendant's act of running after the shooting did not preclude the jury from finding beyond a reasonable doubt that defendant had agreed with Jamison and German before reentering the building to take the lethal action of shooting into the area of the skating rink. Further, evidence was presented that defendant gave the police a false name after the shooting on January 17, 2012. Evidence that a defendant tried to flee or conceal his identity from the police is relevant to show consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 399-401; 504 NW2d 666 (1993), overruled on other grounds in *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996); see also *People v Kowalsk*, 489 Mich 488, 509 n 37; 803 NW2d 200 (2011).

Considered as a whole, and viewed in the light most favorable to the prosecution, the evidence was sufficient to establish defendant's guilt of both a conspiracy to commit first-degree murder and the six counts of assault with intent to commit murder beyond a reasonable doubt.

IV. PROSECUTORIAL MISCONDUCT

Defendant raises several allegations of prosecutorial misconduct based on the prosecutor's remarks in his opening statement and closing rebuttal argument, and an offer of proof made in connection with Deputy Moore's testimony. Because defendant failed to object to the prosecutor's remarks at trial, or object to the prosecutor's conduct in relation to the offer of proof, these claims are not preserved for appeal. *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999); *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010), see also *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("[a]n objection on one ground at trial is insufficient to preserve an appellate attack based on a different ground"). Therefore, appellate relief is foreclosed unless defendant can establish "(1) that [an] error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness,

integrity, or public reputation of judicial proceedings." *People v Vaughn*, 491 Mich 642, 664-665; 821 NW2d 288 (2012), citing *Carines*, 460 Mich at 763; see also *Fyda*, 288 Mich App at 460-461.

This Court reviews claims of prosecutorial misconduct by examining the entire record and evaluating a prosecutor's conduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). We find no merit to defendant's argument that the prosecutor's offer of proof in relation to Deputy Moore's testimony was improper. A prosecutor's good-faith effort to admit testimony does not constitute misconduct so long as the attempt does not prejudice the defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). In this case, the prosecutor's offer of proof regarding whether Deputy Moore should be permitted to offer testimony concerning gang activity was made outside the presence of the jury. Because the admissibility of this testimony was addressed outside the presence of the jury, and the prosecutor stayed within the parameters of the trial court's evidentiary ruling when eliciting testimony regarding the meaning of LBM, defendant has not established any misconduct by the prosecutor.

To the extent that defendant challenges the trial court's evidentiary ruling to allow Deputy Moore to offer testimony regarding the meaning of the initials LBM, we review the trial court's decision for an abuse of discretion. *Unger*, 278 Mich App at 216. The trial court allowed the testimony because this subject matter was raised during the prior testimony of Lee Grayer, the promoter for the skating party. The testimony was limited to the meaning of the initials "LBM." Contrary to what defendant argues, the trial court did not allow the evidence to establish that defendant was part of the gang, expressly or by innuendo. The trial court also offered to provide a cautionary instruction, upon request, to avoid any perceived prejudice arising from the limited testimony. Under these circumstances, the trial court did not abuse its discretion.

In reviewing defendant's challenges to the prosecutor's remarks in opening statement and closing rebuttal argument, we must review the prosecutor's remarks in light of the entire record and the context in which they were made. *Dobek*, 274 Mich App at 64. "Opening statement is the appropriate time to state the facts that will be proven at trial." *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). Although emotional language is an important weapon available to the prosecution, *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996), we agree that the prosecutor exceeded the bounds of proper argument by making a prefatory remark that "[t]his is not Columbine, this is no Aurora, this isn't Virginia Tech, this isn't a shooting on a military base and yet in light of all the things we've been hearing over the recent past, how different is this really?" Nonetheless, this is not a case where the prosecutor created a great likelihood that the jury would attempt to compare defendant's character to a notorious criminal figure. See *People v Kelley*, 142 Mich App 671, 673; 370 NW2d 321 (1985). Rather, the prosecutor asserted that the evidence would establish another inexcusable and horrific shooting. Even defense counsel characterized the shooting in his closing argument as a "horrific event," in part because his defense was based on the theory that defendant was not a participant in the shooting. Thus examined in context, the prosecutor's brief remark, while improper, was not so egregious to be considered outcome determinative. Because defendant's substantial rights were not affected by the prosecutor's improper remark, reversal is not warranted. *Vaughn*, 491 Mich at 666.

We also reject defendant's argument that the prosecutor's "spaghetti on the wall," "red herring," "snitches get stitches," and "poppycock" remarks in rebuttal argument require reversal. A prosecutor may not suggest that defense counsel intentionally attempted to mislead the jury. *Fyda*, 288 Mich App at 461. But "[a] prosecutor may fairly respond to an issue raised by the defendant." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

The prosecutor's "spaghetti on the wall" and "poppycock" remarks, examined in context, were responsive to the defense arguments that there was no evidence of defendant's participation in the shooting. The "spaghetti on the wall" remark was responsive to the defense theory that there was no evidence of defendant's participation in the shooting. At the close of rebuttal argument, the prosecutor stated that "the defense theory that you just heard is nothing but poppycock." Examined in context, the prosecutor did not suggest that defense counsel was trying to mislead the jury, but rather was addressing the defense theory that the evidence did not establish defendant's participation in the shooting. We cannot find that use of the term "poppycock" as a characterization of this theory rendered the prosecutor's response unfair. The "red herring" remark appears to be an inartful attempt to point out that that defense counsel did not fully summarize the evidence bearing on Hardiman's credibility and ability to identify defendant. While use of the phrase "red herring" may have been inappropriate, the overall argument was a fair response to defense counsel's closing argument. Viewed in light of the entire record, the challenged remarks were made in the context of an overall argument that fairly responded to defense counsel's arguments regarding the lack of evidence produced by the prosecution at trial. Accordingly, the remarks do not establish plain error warranting relief. *Fyda*, 288 Mich App at 462.

Defendant also characterizes the prosecutor's remark "snitches get stitches" as an improper attempt to suggest that defense counsel was trying to mislead the jury. However, our review reveals that the remark was part of the prosecutor's response to defense counsel's suggestion that Hardiman provided false information to the police because he was embarrassed that the shooting took place while he was working security. The prosecutor relied on Hardiman's trial testimony regarding his reluctance to testify and his demeanor to argue that "we can speculate all we want why he did it" and to suggest that the case had "significant effect on his psyche and perhaps his physical safety in the community in which he lives." A prosecutor may not make a factual statement that is not supported by the evidence, but is free to argue the evidence and all reasonable inferences arising from the evidence as it relates to his theory of the case. *Dobek*, 274 Mich App at 58. The prosecutor may also argue on the basis of the evidence whether a witness is credible. *Unger*, 278 Mich App at 240. A witness's demeanor properly may be considered by a jury in determining the witness's credibility. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). The issue of Hardiman facing "difficulties" for testifying in this case arose during the course of trial when he was asked if he would testify truthfully despite " . . . the difficulties, perhaps, that could have caused you in the community?" By answering "Right," clearly the issue of Hardiman's safety within the community was brought to light. Thus, examined in context, the "snitches get stitches" remark appears to be responsive to defense counsel's speculation that Hardiman had a motive to cooperate with the police, to the extent that he would provide false information, by suggesting that Hardiman also had reason to not want to cooperate out of concern for his safety. Accordingly, we find no plain error. Further, the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence" and "[y]ou should only accept things the lawyers say that are supported by the

evidence or by your own common sense and general knowledge." The court's instruction was sufficient to protect defendant's substantial rights.

Defendant alternatively argues that defense counsel was ineffective for failing to object to the prosecutor's conduct. Because defendant failed to move for a new trial or *Ginther*[7] hearing, our review of this claim is limited to errors apparent from the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, defendant bears the burden of establishing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Vaughn*, 491 Mich at 669. Counsel is strongly presumed to have rendered adequate assistance. *Id.* at 670.

Declining to raise an objection to prosecutorial remarks, especially during closing argument, can often be consistent with sound trial strategy because an objection will draw attention to the remarks. See *People v Eliason*, 300 Mich App 293, 302-303; 833 NW2d 357 (2013), lv gtd on other grounds ___ Mich ___; 840 NW2d 330 (2013); *Unger*, 278 Mich App at 242. In this case, the prosecutor's remarks either were not improper or were not particularly egregious considering the context in which they were made. Defendant has failed to overcome the strong presumption that any failure to object was reasonable trial strategy. Further, defendant has not demonstrated that further factual development in necessary to properly review these claims. Accordingly, we also deny defendant's request that we remand this case for an evidentiary hearing on this issue. MCR 7.211(C)(1)(a); *People v Chapo*, 283 Mich App 360, 369; 770 NW2d 68 (2009); *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

V. JURY VOIR DIRE

Lastly, defendant argues that he was deprived of his right to an impartial jury because the prosecutor failed to mention Hardiman's name when identifying potential witnesses during jury selection. Because defense counsel did not object to this omission and expressed satisfaction with the jury as impaneled, defendant's substantive challenge to the composition of the jury has been waived. *People v Hubbard (After Remand)*, 217 Mich App 459, 466-467; 552 NW2d 493 (1996). See also, *Kowalski*, 489 Mich at 503: "This Court has defined 'waiver' as 'the intentional relinquishment or abandonment of a known right.'" (quoting *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000)). In *Carter* our Supreme Court stated: "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Carter*, 462 Mich at 215. Therefore, we limit our review of this claim to defendant's alternative argument that defense counsel was ineffective for failing to object to the prosecutor's failure to identify Hardiman to the jury as a witness who intended to testify at trial.

On appeal, defendant argues that he was prejudiced by the failure to identify Hardiman as a potential witness because it is possible that one of the sitting jurors may have had an undisclosed acquaintanceship or relationship with Hardiman. Although the existence of such a

[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

relationship could have affected defendant's right to a fair and impartial jury, defendant has not provided any factual support for his belief that any sitting juror actually knew Hardiman. A defendant claiming ineffective assistance of counsel bears the burden of establishing the factual predicate of his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), relying in part on *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In *People v Miller*, 482 Mich 540, 561; 759 NW2d 850 (2008), Justice MARKMAN, writing for the majority stated: "As discussed earlier, the proper inquiry is whether the defendant was denied his right to an impartial jury. If he was not, there is no need for a new trial." Defendant asserts there is a possibility that someone may have known Hardiman, and that by knowing Hardiman, that juror would have been impartial. However, such assertions are not fact, but rather speculation. There is no factual basis on which this Court could conclude that any member of the jury knew Hardiman and that said knowledge rendered them impartial. Accordingly, defendant has failed to demonstrate that he was, in fact, denied his right to an impartial jury. Additionally, absent any factual support for defendant's claim that one of the jurors knew Hardiman, there is no basis for concluding that defendant was prejudiced by defense counsel's failure to object or to insist that Hardiman be identified as a potential witness. Thus, even if this Court were to conclude that defense counsel's failure to rectify the error of Hardiman's name not being stated by the trial court to potential jurors constituted ineffective assistance of counsel, the absence of any fact that any of the jurors knew Hardiman, precludes us from finding the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. See, *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed2d 674 (1984). Accordingly, this ineffective assistance of counsel claim cannot succeed because defendant has failed to establish the factual predicate for his claim, *Hoag*, 460 Mich at 6; *Carbin*, 463 Mich at 600; nor can he demonstrate prejudice. *Strickland*, 466 US at 694. Further, without an appropriate offer of proof in support of this claim, defendant is not entitled to a remand for an evidentiary hearing on this issue. MCR 7.211(C)(1)(a); *Chapo*, 283 Mich App at 369; *Williams*, 275 Mich App at 200.

IV. CONCLUSION

We affirm defendant's convictions, but remand for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly